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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1404

IRA M. BALL, ET AL.,

Petitioners,

-vs-

HUGH L. CAREY, INDIVIDUALLY AND AS GOVERNOR OF THE STATE OF NEW YORK, ET AL.,

Respondents.

PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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Ira M. Ball, one of the Petitioners herein, submits the following in reply to the "BRIEF FOR RESPONDENTS IN OPPOSITION TO GRANTING CERTIORARI," dated March 20, 1979.

On pg. 2 thereof, second full paragraph under the title "Facts," Respondents state:

"The budget contained no recommended appropriations for bingo control activities in the Commission but did recommend an appropriation of $361,000 to the Board for the regulation of bingo."

But, Judge Gabrielli writing for a unanimous Court of Appeals in Ball v. State (Appendix D at pgs. 4 and 5), specifically found that:

"Although no funds were specifically appropriated for the (Bingo) Commission or for claimant's (Chairman Ball's) salary, the budget contained a lump sum appropriation for $399,200 under the title 'Regulation of Wagering' earmarked for 'Personal services - regular' (L 1975, c 50, p 240). A portion of these funds was presumably intended for the regulation of bingo activities in the State." (Emphasis supplied.)

Judge Gabrielli corroborated the foregoing at pg. 8, Appendix D, as follows:

"It is also noteworthy that on January 20, 1976, the Governor submitted, in connection with the 1976-1977 budget, a new budget bill to abolish the Bingo Control Commission (S 7298/A 9268). The bill was identical to that which failed to win legislative approval in 1975 except that it contained the following provision:

'All appropriations made to the State Bingo Control Commission pursuant to Section 1 of Chapter 50 of the Laws of 1975, to the extent of remaining unexpended balances, are hereby transferred and made available for use by the State Racing and Wagering Board.'" (Emphasis supplied.)

This proves that Respondents' statement quoted at the top of pg. 2, supra, is not true and that the Legislature did make an appropriation in 1975 to the Bingo Commission for regulation of bingo.

At pgs. 12 and 13 of Appendix D, Judge Gabrielli held that, by the failure of the 1975 Legislature to pass the budget bills abolishing the Commission, it "may be deemed to have expressed an intent not to eliminate the Commission or the office of Chairman." (Emphasis supplied.)

Further, Judge Gabrielli found that Respondent Governor Carey, by "reintroduction of the bill eliminating the Bingo Control

Commission in 1976 quite obviously seemed to indicate his own understanding that the Legislature had not, by the mere enactment of the 1975-76 budget, repealed the applicable sections of the Executive Law." (Pg. 13 of Appendix D.)

The foregoing discussion by Judge Gabrielli not only proves that the Respondents have misrepresented to this Court the alleged appropriation to the Racing and Wagering Board of $210,000 but, by stating that the Racing and Wagering Board "did in fact proceed to regulate bingo in New York State," is an admission by Respondents that they caused the illegal usurpation of the Petitioners' offices and position.

At pg. 4 of Appendix D, Judge Gabrielli also found that there had been

no "transfer of function" from the Bingo Commission to the Racing and Wagering Board as claimed by Respondents at the bottom of pg. 2 of their Brief:

> "The budget contained no provision relating to the abolition of the Bingo Control Commission or the transfer of its functions to the Racing and Wagering Board." (Emphasis supplied.)

The Respondents herein are bound by the findings of the Court of Appeals in Ball v. State under the theory of collateral or judicial estoppel. See 5 New York Civil Practice, Weinstein-Korn-Miller, ¶¶5011:23, et seq., particularly 5011:27, and "The Doctrine of Preclusion Against Inconsistent Positions in Judicial Proceedings," 59 Harvard Law Review 1132.

In the footnote at the bottom of pg. 3 of Respondents' Brief, they maintain that

although the Chairmanship and the Commission itself were not abolished as to the Claimant Ball in Ball v. State, "Such was not the case for the remaining petitioners herein." This is a ridiculous argument. If the Commission was not abolished as to Ball, it was not abolished as to any and all of the remaining Petitioners.

REPLY TO RESPONDENTS' "ARGUMENT"

On pgs. 4 and 5 of Respondents' Brief, under the title "Argument," Respondents attempt to raise questions of fact which is not permissible, particularly where the certiorari questions arise out of a motion to dismiss a complaint where all of the allegations of the complaint must be accepted as true.

A good example is Respondents' statement that "it is well within the power of the sovereign to streamline government and

terminate positions as a result of fiscal exigencies." (Citing cases.) There is absolutely no proof in the record of any "fiscal exigencies" with regard to bingo operations. As a matter of fact, the evidence is just to the contrary as alleged in the "THIRD CAUSE OF ACTION" of Petitioners' complaint, printed at pgs. 44-47 of the Record on Appeal to the Appellate Division, Third Department, a copy of which is in the hands of the Court.

Respondents herein attempted to raise the very same argument for the first time upon their appeal to the Court of Appeals in Ball v. State and the attempt failed. The matter was briefed in POINT IX of the Claimant Ball's Brief to the Court of Appeals (copy filed with the Court). The Attorney General in his Brief to the Court of Appeals cited two of the three cases

he now cites at the end of the first paragraph on pg. 4 of his Brief herein, viz: Matter of Saur v. Director of Creedmoor Psychiatric Center and Matter of Blyn v. Bartlett. Judge Gabrielli denied the application of said cases to the situation in Ball v. State. See Appendix D, pgs. 20-21. Therefore, this argument is also barred as a matter of "collateral estoppel" or "judicial estoppel," referred to at pg. 5, supra.

As a matter of fact, all of the cases cited in the first paragraph and the footnote on pg. 4 of Respondents' Brief are not in point since they relate to situations where money was appropriated by the Legislature in a lump sum to a department or agency of the State. It has been held that the department or agency head then has discretion to abolish positions under his control since he has the responsibility

of living within the lump sum appropriation made by the Legislature and the question then becomes one of the abuse of discretion by the agency head. This situation is explained very well in Goodman v. State, 37 A.D. 2d 703, 322 N.Y.S. 2d 858 at 859-860.

That is not the situation in the case at bar. Neither the Chairman of the Commission (Ball) nor the remaining Commissioners were ever given an opportunity to "use the (reduced) resources of their (his) Department as to provide the maximum of services and facilities required by law to be furnished." Petitioners allege in par. 7 of their Complaint (Pg. 30 of the Record on Appeal to the Appellate Division, Third Department) that:

> "The Plaintiffs never resigned, or abandoned or forfeited their public offices, positions and employment, nor have they been removed or displaced by the judgment of any court

nor have any charges been brought against them. That the Commission never abolished or discharged any of the Plaintiffs referred to in pars. '4' and '5' above." (Emphasis supplied.)

Their power was usurped by the Respondents herein as alleged in par. 20 of Complaint.*

In the footnote at the bottom of pg. 4 of Respondents' Brief, the Attorney General states:

> "* * * but positions in civil service of the State may be abolished by the absence of an appropriation (citing cases.)."

This statement is at best a half truth. The Attorney General himself set forth the correct law in his letter dated May 21, 1976 to the New York State Division of the Budget, headed by the Respondent Peter Goldmark, printed in full at pgs. 274 and 275 of the Record on Appeal to the Appellate Division, Third Department, copy filed with this Court, where he stated as follows:

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* Pg. 37, Appellate Division Record on Appeal.

> "It is now well established that an employee holding permanent status in the classified service may be suspended as the result of abolition of positions for reasons of economy provided only that the abolitions are necessary and made in good faith (Civil Service Law, §§80, 80-a; Matter of Schwab v. Bowen, 80 Misc. 2d 763, affd. 51 A.D. 2d 574 (2d Dept., 1976); Matter of Felder v. Fullen, 27 NYS 2d 699, affd. 263 App. Div. 986, affd. 289 N.Y. 658 (1942); Mtr. of Danker v. Dept. of Health, 153 Misc. 502, affd. 242 App. Div. 765 (1st Dept., 1935); Matter of Brizzolara v. McKenzie, 166 Misc. 282 (Sup. Ct., N.Y. Co., 1938); Matter of Reilly v. Smith, 92 Misc. 309 (Sup. Ct., N.Y. Co., 1915)). See also DeLury v. City of New York, 48 A.D. 2d 595, 601 (1st Dept., 1975), citing with approval the reasoning in Matter of Schwab v. Bowen, (supra)."

The question of "good faith" is discussed at pgs. 19-21 and 42-56 of the Petition for Certiorari herein.

Both the Buffalo P.B.A. and the Jones cases Respondents cite rest upon proof of good faith---a factor totally missing in the case at bar.

The Court will note that in addition to the "good faith" requirement, the Attorney General states that abolitions must be necessary for economy purposes. This involves the third question presented in the Petition at pgs. 9-10 and discussed at pg. 64 thereof where Petitioners raised the issue of converting the bingo licensing fees "into an 'unconstitutional revenue tax' (excise tax)."

The question was raised in the Petitioners' "THIRD CAUSE OF ACTION" at pgs. 44-47 of the Record on Appeal to the Appellate Division, Third Department. The question is discussed in depth under POINT II B under the title of "DEFENDANT-RESPONDENTS MISREPRESENTED TO THE LEGISLATURE THE UNAVAILABILITY OF FUNDS TO OPERATE THE BINGO CONTROL COMMISSION.", at pgs. 43-50 of the "BRIEF OF APPELLANTS-RESPONDENTS" submitted to the Appellate

Division, Third Department, copy filed with the Court.

However, the entire picture is succintly set forth at pg. 276 of the aforesaid Record on Appeal in a letter from the Director of State Accounts to the Petitioner Ball, attesting to the fact that although in 1975-76 the State of New York received total bingo licensing fees of $1,203,422.50, it only spent $162,492.57 for bingo administration, less than 14 percent. These were licensing fees imposed under the State's police power and constitutionally must be first used to support the operations of the State Bingo Control Commission. Instead they were diverted into the general fund.

Finally, Respondents' statement in the last sentence on pg. 5 of their Brief that "* * * the New York Courts properly found, it is submitted, that the factual allegations of the complaint were insufficient, * * *.", is completely in error since any such holding by Special Term was made prior to the Court of Appeals' decision in Ball v. State. Special Term specifically cited Ball v. State as being "contra." See Appendix B, pg. 8 and Appendix C, pg. 6. If any inference is to be drawn from the affirmance of Ball v. State by the Court of Appeals, it is that the Petitioners have a good cause of action based on the tort liability of Respondents.

CONCLUSION

PETITIONERS' APPLICATION FOR CERTIORARI SHOULD BE GRANTED.

Dated: April 5, 1979

Respectfully submitted,

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